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# Karim bin Ab Jabbar v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO P-05–9 OF 2010
ABDUL MALIK ISHAK, AZAHAR MOHAMED AND ABDUL AZIZ ABD RAHIM JJCA
18 MARCH 2013

C

*Criminal Procedure — Trial — Misdirection — Whether trial judge's failure to rule whether accused had rebutted presumption of trafficking entitled him to acquittal — Whether evidence of trafficking overwhelming — Whether appeal court could invoke proviso to s 60(1) of the Courts of Judicature Act 1964 to affirm conviction and sentence despite trial judge's misdirection — Dangerous Drugs Act 1952 s 37(da)(vi)*

D

One of the main grounds raised by the appellant in the instant appeal against his conviction and sentence was that the trial judge, after invoking the presumption of trafficking against him under s 37(da)(vi) of the Dangerous Drugs Act 1952 ('DDA'), failed to rule whether he had rebutted that presumption. Such a failure, said the appellant, was fatal as his conviction was based entirely on presumed trafficking, which presumption was rebuttable under the law. The appellant was found guilty by the High Court of trafficking in 9,958.5g of cannabis and was sentenced to death under the DDA. The prosecution's evidence during the trial was that the appellant was arrested after a high-speed car chase with a police party. A bag containing the cannabis was found in the boot of the car. The appellant's defence was that he operated a pirate taxi service and the bag belonged to a passenger he had taken for hire but who got out of the car and fled when he saw the police. The appellant denied there was any car chase or that he knew about the presence of the drugs or that his story about the passenger was fabricated. He urged the court to substitute the conviction for trafficking with a conviction for possession under s 6 of the DDA.

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Held, dismissing the appeal and affirming the conviction and sentence:

(1) Since there was solid evidence of trafficking against the appellant, the court invoked the proviso to s 60(1) of the Courts of Judicature Act 1964 and upheld the conviction and sentence notwithstanding the misdirection by the trial judge in not making a ruling whether the presumption of trafficking under s 37(da)(vi) of the DDA had been rebutted on balance of probabilities (see para 36).

(2) The high-speed chase, by way of inference, showed the appellant knew that the drugs were inside the boot of his car. That knowledge must be

imputed to him as the circumstances suggested a nexus between his conduct and the offence. It was entirely a question of fact and such conduct was admissible under s 8 of the Evidence Act 1950. The trial judge made an affirmative finding of possession before he invoked the presumption of trafficking against the appellant (see paras 16 & 23).

**[Bahasa Malaysia summary**

Salah satu alasan yang dibangkitkan oleh perayu dalam rayuan ini terhadap sabitan dan hukuman adalah bahawa hakim perbicaraan, selepas membangkitkan anggapan mengedar terhadapnya di bawah s 37(da)(vi) Akta Dadah Berbahaya 1952 ('ADB'), gagal untuk memerintahkan sama ada dia telah mematahkan anggapan tersebut. Kegagalan sedemikian, dikatakan oleh perayu, tidak dapat dielakkan memandangkan sabitannya adalah berdasarkan keseluruhannya atas anggapan mengedar, yang mana anggapan boleh dipatahkan di bawah undang-undang. Perayu didapati bersalah mengedar kanabis 9,958.5g oleh Mahkamah Tinggi dan dihukum mati di bawah ADB. Keterangan pendakwaan semasa perbicaraan adalah bahawa perayu ditangkap selepas kejar mengejar kereta dengan pasukan polis. Beg mengandungi kanabis diperolehi di dalam but kereta. Pembelaan perayu adalah bahawa dia menjalankan khidmat teksi persendirian dan beg dimiliki oleh penumpang dia tumpangkan tetapi penumpang itu telah keluar dari kereta dan melarikan diri apabila ternampak polis. Perayu menafikan bahawa terdapat kejar mengejar kereta atau dia mengetahui mengenai kehadiran dadah atau ceritanya mengenai penumpang adalah rekaan. Dia memohon mahkamah untuk menggantikan sabitan untuk mengedar dengan sabitan untuk milikan di bawah s 6 ADB.

**Diputuskan**, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Memandangkan terdapat keterangan kukuh pengedaran terhadap perayu, mahkamah membangkitkan peruntukan di bawah s 60(1) Akta Mahkamah Kehakiman 1964 dan mengesahkan sabitan dan hukuman walaupun salah arah oleh hakim perbicaraan kerana tidak membuat perintah sama ada anggapan pengedaran di bawah s 37(da)(vi) ADB telah dipatahkan atas imbangan kebarangkalian (lihat perenggan 36).

(2) Kejar mengejar kereta, melalui inferens, menunjukkan perayu mengetahui bahawa dadah adalah di dalam but keretanya. Pengetahuan mesti dikatakan kepadanya memandangkan keadaan mencadangkan neksus antara tingkah lakunya dan kesalahan. Keseluruhannya adalah persoalan fakta dan tingkah laku sedemikian adalah boleh diterima di bawah s 8 Akta Keterangan 1950. Hakim perbicaraan membuat dapatan afirmatif kepada milikan sebelum beliau membangkitkan anggapan pengedaran terhadap perayu (lihat perenggan 16 & 23).]

**Notes**

For cases on misdirection, see 5(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 5472–5482.

**Cases referred to**

*Alcontara a/l Ambross Anthony v PP* [1996] 1 MLJ 209; [1996] 1 CLJ 705, FC (refd)
*Balachandran v PP* [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
*Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237 (refd)
*Director of Public Prosecutions v Brooks* [1974] 2 All ER 840, PC (folld)
*Looi Kow Chai & Anor v PP* [2003] 2 MLJ 65; [2003] 2 AMR 89, CA (refd)
*Mohamad Radhi bin Yaakob v PP* [1991] 3 MLJ 169, SC (refd)
*Muhammed bin Hassan v PP* [1998] 2 MLJ 273, FC (refd)
*Pendakwa Raya v Kang Ho Soh* [1992] 1 MLJ 360, HC (refd)
*PP v Abdul Manaf bin Muhamad Hassan* [2006] 3 MLJ 193; [2006] 2 CLJ 129, FC (refd)
*PP v Ku Yahya Ku Bahari & Anor* [2002] 1 CLJ 113, CA (refd)
*PP v Yuvaraj* [1969] 2 MLJ 89, PC (refd)
*Tan Boon Kean v PP* [1995] 3 MLJ 514 ; [1995] 4 CLJ 456, FC (refd)
*Teoh Hoe Chye v PP Yeap Teong Tean v PP* [1987] 1 MLJ 220, SC (refd)
*Toh Ah Loh and Mak Thim v Rex* [1949] 1 MLJ 54, HC (refd)
*Tunde Apatira & Ors v PP* [2001] 1 MLJ 259, FC (consd)
*Yee Ya Mang v PP* [1972] 1 MLJ 120, HC (refd)

**Legislation referred to**

Courts of Judicature Act 1964 ss 60(1), 92(1)
Criminal Procedure Code s 422
Dangerous Drugs Act 1952 ss 6, 12, 37(da)(vi), 39A(2)(f), 39B(1)(a), (2)
Dangerous Drugs Act [JM] s 7(c)
Evidence Act 1950 s 8
Prevention of Corruption Act 1961 (repealed by the Anti-Corruption Act 1997) s 14

**Appeal from:** Criminal Trial No 45–28 of 2003 (High Court, Pulau Pinang)

*Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the appellant.*
*Nurulhuda Nuraini bt Mohd Nor (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.*

**Abdul Malik Ishak JCA (delivering judgment of the court):**

INTRODUCTION

**[1]** Before the Penang High Court, the appellant was charged for an offence

of trafficking in dangerous drugs, to wit, 9958.5g of cannabis, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') and punishable under s 39B(2) of the DDA. The charge framed against the appellant was worded in this way:

> Bahawa kamu pada 17hb Mei 2002 jam lebih kurang 2.30 pagi di Jalan Bukit Belah, Teluk Kumbar, Bayan Lepas dalam Daerah Barat Daya dalam Negeri Pulau Pinang didapati telah mengedar dadah berbahaya iaitu cannabis seberat 9958.5 gram dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah section 39B(2) Akta yang sama.

**[2]** At the conclusion of the trial, the appellant was convicted and sentenced to death. Aggrieved by that decision, the appellant now appeals to this court.

## THE FACTUAL MATRIX

**[3]** The salient facts that lie at the core of this appeal have been sufficiently set out by the High Court judge in his grounds of judgment as seen in the appeal record at *Jilid 2*. The facts may be summarised, within a narrow compass, as follows.

**[4]** On 17 May 2002 at about 1.30am, Chief Insp Rajaram a/l Arumugam ('SP6') accompanied by a police party, proceeded to Jalan Faraday, Georgetown and upon arrival, took up ambush position. SP6, at the material time, was driving a motorcar accompanied by two police personnel, namely, Detective Corporal Shahbuddin and Detective Corporal Taufik. SP6 parked his motorcar on top of a hill at Jalan Faraday while the other members of the police party who were in separate motorcars took up ambush positions at different parts of Jalan Faraday. SP6 and his police party waited at their ambush positions for about an hour.

**[5]** The leader of the ambush party was ASP Abdul Rahman.

**[6]** At about 2.30am, SP6 saw a Proton Wira motorcar bearing registration number PFE 235 driven by a male individual, later identified as the appellant, entering the targeted area. According to SP6, the Proton Wira motorcar driven by the appellant came from the direction of Jalan Tengku Kudin and entered Jalan Faraday. The appellant was then seen driving the said motorcar along Jalan Faraday and made a U-turn at the T-junction of Jalan Faraday. Having done that, the appellant turned the said motorcar to the left, reversed and returned once again along Jalan Faraday. At this juncture, according to SP6, the appellant realised the presence of the police personnel in the area. The appellant then sped away in the Proton Wira motorcar along Jalan Tengku

Kudin and SP6 gave chase in his motorcar at the speed of about 170km per hour. It was a dramatic high speed chase.

**[7]** The high speed car chase took SP6 and his men through the Lebuhraya Bayan Lepas, up to the flyover towards Teluk Kumbar and straight to Balik Pulau. At the junction of Permatang Damar Laut, the appellant tried to manoeuvre the Proton Wira motorcar to the left and head towards Permatang Damar Laut but in the process of doing so, he hit the road divider. SP6 swiftly blocked the front of the Proton Wira motorcar but the appellant managed to reverse and again, he sped along Jalan Bukit Belah in the direction of Teluk Kumbar. But at about 1km before reaching Teluk Kumbar, the appellant pulled up the Proton Wira motorcar at the road shoulder. SP6 quickly blocked the path of the Proton Wira motorcar and prevented it from moving. SP6 found that the front left tyre of the Proton Wira motorcar had punctured.

**[8]** The appellant was duly arrested. A search was then made in regard to the Proton Wira motorcar. From the boot of the Proton Wira motorcar, SP6 found a blue-coloured travelling bag with the words 'ALL STAR' written on the bag. Inside the said bag, SP6 found ten compressed slabs of dried vegetable materials each wrapped in a transparent plastic and upon an analysis conducted by Mr Khairuzzaman bin Mustafa ('SP5'), the government chemist, the slabs were confirmed to be cannabis weighing 9958.5g.

**[9]** The Proton Wira motorcar was registered in the appellant's name at the material time.

THE DEFENCE OF THE APPELLANT

**[10]** The appellant worked as an unlicensed taxi driver ('teksi sapu') and on 17 May 2002 at about 10.15pm, he had picked up a male Malay passenger at Jalan Udini or Jalan Tengku Kudin who was carrying a blue-coloured bag. That male Malay passenger was Hafiz and after he placed the blue-coloured bag in the boot of the Proton Wira motorcar, he sat at the back of the said motorcar.

**[11]** The appellant testified that Hafiz asked to be sent to Bukit Belah and the appellant complied. The appellant charged Hafiz RM20 for the trip. When the appellant's Proton Wira motorcar reached Jalan Bukit Belah, Hafiz asked the appellant to stop the said motorcar. At this point of time, another motorcar overtook the appellant's Proton Wira motorcar and blocked its path. Hafiz, who was seated at the back as a passenger, opened the left door of the Proton Wira motorcar and bolted.

**[12]** The appellant denied that there was a motorcar chase from Jalan Tengku Kudin to Jalan Bukit Belah. The appellant also denied that he drove at a fast

speed to avoid being arrested by the police. The appellant further denied that he knew about the presence of the drugs in his Proton Wira motorcar and that was why he drove at a fast speed to avoid being arrested by the police. The appellant denied that he drove exceeding 170km per hour. The appellant denied that he concocted the presence of Hafiz in his Proton Wira motorcar and he too denied that he concocted the story that Hafiz put the blue-coloured bag containing the drugs in the boot of the said motorcar. Finally, the appellant also denied that the front left tyre of his Proton Wira motorcar had punctured.

ANALYSIS

**[13]** We were asked to decide whether the High Court judge misdirected himself when His Lordship failed at the end of the defence case to rule whether the appellant had rebutted the presumption under s 37(da)(vi) of the DDA. This is certainly a point of law of material significance.

**[14]** It must be borne in mind that the High Court judge perused through the evidence of the prosecution with a fine toothcomb before His Lordship ruled that there was a prima facie case established against the appellant following the now famous guidelines set out in *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 2 AMR 89 (CA), and in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85 (FC).

**[15]** The High Court judge found that the prosecution had proved the element of possession on the strength of the following salient facts:

(a) that the blue-coloured bag containing the drugs were found in the boot of the appellant's own motorcar which was driven by the appellant at the time of his arrest; and

(b) the conduct of the appellant in speeding away at a fast speed when he realised that he was being chased by SP6 showed that he knew of the presence of the drugs in the boot of his own motorcar.

**[16]** Possession is an important ingredient in the charge of trafficking (*Pendakwa Raya v Kang Ho Soh* [1992] 1 MLJ 360 at p 371). Here, the High Court judge made an affirmative finding of 'possession' before the presumption of trafficking under s 37(da)(vi) of the DDA was invoked (*Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273 (FC)). At pp 108–110 of the appeal record at *Jilid* 2, His Lordship had this to say:

> Di akhir kes pendakwaan, Mahkamah berpuas hati setelah penelitian dan penilaian yang maksima serta menyeluruh ke atas segala keterangan yang telah dikemukakan di peringkat pendakwaan, pihak pendakwaan telah berjaya membuktikan satu kes prima facie terhadap OKT atas pertuduhan yang dibawa ke atasnya. Mahkamah mendapati bahawa pendakwaan telah berjaya membuktikan pemilikan oleh OKT

ke atas cannabis yang menjadi hal perkara pertuduhan. Bagi tujuan ini pendakwaan telah mengemukakan keterangan-keterangan berikut:

- Cannabis tersebut dijumpai di dalam boot kereta kepunyaan OKT sendiri.
- OKT sendiri yang memandu kereta ini iaitu kereta bernombor pendaftaran PFE 235.
- Hanya seorang OKT sahaja berada di dalam kereta semasa kereta mula-mula dilihatsehingga ianya berhenti di tepi jalan.
- OKT ada pengetahuan tentang cannabis yang berada di dalam bootnya kerana beliau telah memecut laju apabila beliau sedar pasukan polis mengejarnya.
- OKT memandu laju iaitu mencapai lebih kurang 170 km satu jam dan kerana kelajuannya beliau telah terlajak ketika cuba masuk ke simpang Permatang Damar Laut sehingga terlanggar divider di permukaan simpang tersebut.
- Akibat terlanggar divider ini tayar kiri bahagian hadapan kereta OKT telah pancit dan OKT telah terpaksa berhenti di tepi jalan di Bukit Belah di mana beliau telah ditangkap dan cannabis dijumpai dalam boot keretanya.

Mahkamah berpuas hati bahawa pendakwaan telah berjaya membuktikan milikan cannabis tersebut terhadap OKT melalui keterangan saksi-saksinya. Mahkamah telah juga menggunapakai anggapan di bawah section 37(da)(vi) ADB 1952 bagi pembuktian pengedaran.

**[17]** The factual matrix showed that the appellant had the following characteristics in relation to the blue-coloured bag which contained the drugs in the boot of the appellant's own motorcar:

(a) that the appellant must know the nature of the thing which he possessed;

(b) that the appellant must have the power of disposal over it; and

(c) that the appellant must be conscious of his possession of the thing in question.

**[18]** In this context, it is ideal to refer to such cases like *Toh Ah Loh And Mak Thim v Rex* [1949] 1 MLJ 54, and *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237, at p 239.

**[19]** Knowledge is a mental element and it is one of the pre-requisites of possession.

**[20]** In *Yee Ya Mang v Public Prosecutor* [1972] 1 MLJ 120, Sharma J defined 'possession' in these erudite terms:

> The word 'possession' implies a physical capacity to deal with the thing as one likes to the exclusion of everyone and a determination to exercise that physical power on one's own behalf. It implies dominion and consciousness in the mind of the person having 'possession' that he not only has such dominion but also that he can exercise it.

**[21]** The learned deputy public prosecutor in the person of Madam Nurulhuda Nuraini bt Mohd Nor argued that the conduct of the appellant in driving the Proton Wira motorcar exceeding 170km per hour with the drugs in the boot of the said motorcar and SP6 chasing after the appellant in a separate motorcar at high speed from Jalan Faraday to Jalan Bukit Belah showed that the drugs were in the physical custody of the appellant and under his control. She further argued that an inference should be drawn that the appellant knew that the blue-coloured bag located in the boot of his own motorcar contained the impugned drugs, to wit, cannabis. Indeed the High Court judge was right and His Lordship was entitled to draw the inference that the appellant knew that he was carrying drugs in his own motorcar when the appellant sped at high speed upon realising that the police was chasing him.

**[22]** At this juncture, it is ideal to refer to the case of *Director of Public Prosecutions v Brooks* [1974] 2 All ER 840, a decision of the Privy Council. In that case, some police officers saw a van parked, with its engine running, in a lay-by at Braco, Jamaica. The respondent was occupying the driver's seat and there were several other people in the van. When the officers hurried towards the van, the occupants scrambled out and ran off. The respondent was caught by the officers. Inside the body of the van, which was neither visible nor accessible from the van itself, the police found 19 sacks containing more than 1,000 pounds of *ganja*. When questioned by the officers, the respondent said that he had been employed by Reid and had been told to drive the van, loaded as it was, to Braco. When asked whether the respondent knew what was in the sacks, the respondent made no reply. In due course, the respondent was charged with, and convicted of, unlawfully having ganja in his possession, contrary to s 7(c) of the Dangerous Drugs Act of Jamaica. He appealed to the Court of Appeal of Jamaica, which quashed the conviction on the ground that the respondent, as Reid's servant, merely had custody of the van and the contents, and that was not enough to constitute possession. On appeal to the Privy Council, the appeal was allowed and the conviction was restored. The Privy Council held that a person had possession of a dangerous drug, within s 7(c) of the Dangerous Drugs Act of Jamaica, if, to his knowledge, he had the drug in his physical custody or under his physical control and, based on the available evidence, the respondent had in his physical custody and control the 19 sacks of *ganja* and from the evidence, it could be inferred that the respondent knew what he was carrying in the van. Lord Diplock delivering the judgment of the Privy Council at p 843 aptly said:

> On the evidence, including his own statement to the police, the 19 sacks of *ganja* were clearly in the physical custody of the respondent and under his physical control. The only remaining issue was whether the inference should be drawn that the respondent knew that his load consisted of *ganja*. On all the evidence and in particular the fact that he and the other occupant of the van attempted to run away as soon as they saw the uniformed police approaching, the magistrate was, in Their Lordships' view, fully entitled to draw the inference that the respondent knew what he was carrying in the van.

**[23]** Likewise here, the high speed chase against the appellant by SP6, by way of inference, showed that the appellant knew that the drugs were inside the boot of his motorcar. Knowledge of the presence of the drugs in the boot of the appellant's motorcar must be imputed onto him. The circumstances suggest a nexus between his conduct and the offence, and knowledge can thus be inferred from it. It is entirely a question of fact and such conduct is admissible under s 8 of the Evidence Act 1950.

**[24]** Mr Hisyam Teh Poh Teik for the appellant reiterated that the High Court judge had invoked the presumption of trafficking under s 37(da)(vi) of the DDA but His Lordship, at the end of the defence case, did not rule whether the presumption had been rebutted. According to learned defence counsel, it was imperative for His Lordship to make that ruling, bearing in mind that the case against the appellant hinged on presumed trafficking and that presumption is said to be rebuttable (*Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89 (PC)).

**[25]** It was emphasised that the defence of the appellant was that the blue-coloured bag (learned counsel referred to it as the 'travelling bag') and its contents belonged to the appellant's passenger by the name of Hafiz and that Hafiz had fled the scene of the crime.

**[26]** The deeming provision of s 37(da)(vi) of the DDA is best illustrated by referring to the Privy Council decision of *Public Prosecutor v Yuvaraj* which turned on the phrase 'until the contrary is proved' which also appeared in s 14 of the Prevention of Corruption Act 1961. The question that was reserved for the Federal Court in *Public Prosecutor v Yuvaraj* which eventually went on appeal to the Privy Council was framed in this way (see p 90):

> Whether in a prosecution under s 4(a) of the Prevention of Corruption Act, 1961, a presumption of corruption having been raised under s 14 of the said Act the burden of rebutting this presumption can be said to be discharged by a defence as being reasonable and probable or whether that burden can only be rebutted by proof that the defence is on such fact (or facts) the existence of which is so probable that a prudent man would act on the supposition that it exists. (Section 3 Evidence Ordinance).

**[27]** Lord Diplock delivering the judgment of the Privy Council in *Public Prosecutor v Yuvaraj* at p 92 answered the question posed in this way: A

> The test is the same as that applied in civil proceedings: the balance of probabilities. This was the test which was approved by the Court of Criminal Appeal in *R v Carr Briant* [1943] KB 607 a case upon a provision in an English statute in similar terms to that contained in section 14 of the Malaysian Prevention of Corruption Act 1961. B

**[28]** And according to Mohamed Azmi SCJ in *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169, 171 (SC) the evidential burden to rebut C the statutory presumptions on a balance of probabilities is 'heavier than the burden of casting a reasonable doubt, but it is certainly lighter than the burden of the prosecution to prove beyond reasonable doubt'.

**[29]** It is this evidential burden that Mr Hisyam Teh Poh Teik was harping D on. According to him, the High Court judge failed to make a ruling whether the defence of the appellant had rebutted the presumption of trafficking on the balance of probabilities. Such blatant failure, according to him, constituted a serious misdirection and it was fatal. He then cited three authorities to support his proposition, namely: E

(a) *Public Prosecutor v Ku Yahya Ku Bahari & Anor* [2002] 1 CLJ 113 (CA), a decision of this court delivered by Abdul Hamid Mohamad JCA later the Chief Justice of Malaysia;

(b) *Tan Boon Kean v Public Prosecutor* [1995] 3 MLJ 514; [1995] 4 CLJ 456 F (FC), a decision of the Federal Court delivered by Mohamed Azmi bin Kamaruddin FCJ; and

(c) *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209; [1996] 1 CLJ 705 (FC), a decision of the Federal Court delivered by G Edgar Joseph Jr FCJ.

**[30]** Now, *PP v Ku Yahya Ku Bahari & Anor* was a corruption case involving two respondents who were separately charged but jointly tried in the sessions court. After the sessions court had invoked the presumption under s 14 of the H Prevention of Corruption Act 1961, the sessions court failed at the end of the defence case to rule whether the presumption was rebutted. Abdul Hamid Mohamad JCA (later the Chief Justice of Malaysia) cited with approval the passage in the judgment of the High Court judge who heard the appeal from the sessions court and this can be seen at pp 117–118 and we will now I reproduce that passage:

> Judging from the tenor of the grounds of the learned sessions court judge, it would seem patently clear that he had invoked presumption of s 14 of the said Act, when calling for the defence of both the accused for the charge under s 4 of the said Act.

A Having done so, it behoves then on the defence to rebut this presumption on a balance of probabilities. The learned sessions court judge failed to appreciate the distinction involved, when invoking the said presumption, in terms of the burden of proof, which as I have mentioned, rests with the accused, to rebut on a balance of probabilities. The learned sessions court judge instead went on to hold, that having heard the defence of both the accused, which was a complete denial, the accused, had failed to create a doubt in the prosecution's case. This is obviously a misdirection of law, as it should have been held that the accused had failed to rebut the presumption invoked under s 14 of the Act, on a balance of probabilities for the charge under s 4(a) of the Act.

**[31]** Continuing at pp 122–123, Abdul Hamid Mohamad JCA (later the Chief Justice of Malaysia) aptly said in *PP v Ku Yahya Ku Bahari & Anor*:

D However, that is not the situation in the present appeal. In the present appeal, the learned sessions court judge had not applied the test of 'on the balance of probabilities' in considering whether the presumption had been rebutted, at all. The law requires him to do so where he had resorted to the presumption under s 14, as he had done here in calling for the defence in respect of the charge under section 4(a) — *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89 (PC), *Akin Khan b Abdul Khanan v Public Prosecutor, Malaysia* [1987] 1 CLJ 348; [1987] CLJ (Rep) 40 (SC). But he E had completely failed to do so. Instead he considered all the charges against both the accused together and concluded that their defence had not raised a reasonable doubt on the prosecution's case. In respect of the charges under s 4(a) he should have considered whether the respondents had rebutted the presumption on the balance of probabilities. Furthermore, as rightly pointed out by the learned High Court judge:

F The learned sessions court judge, has also to my mind in a very cursory manner dismissed the defence of both the accused on the charges …

**[32]** *Tan Boon Kean v Public Prosecutor* was a case where the appellant was G called to enter his defence on a charge of trafficking in 25.84g of heroin, an offence under s 39B(1)(a) of the DDA and punishable under s 39B(2) of the DDA. In due course, the appellant was convicted and sentenced to death by the High Court. On appeal to the Federal Court, the deputy public prosecutor conceded that the appellant ought to be convicted for possession of heroin and H the Federal Court accordingly convicted the appellant for an offence of possession of heroin under s 12 of the DDA and punishable under s 39A of the DDA. In regard to the issue of the burden of proof after the presumption of trafficking was invoked, Mohamed Azmi bin Kamaruddin FCJ at p 476 had I this to say:

After carefully perusing the Appeal Record, we are of the view that the learned Judicial Commissioner had fallen short of considering whether the presumption of trafficking under s 37(da) of the Dangerous Drugs Act had been rebutted on balance of probabilities in the evidence, ie whether he was trafficking at the material time or

whether he was in fact forging documents. Our task is made easier when Mr Stanley Augustin conceded before us that the appellant ought to be convicted of possession of the heroin rather than that of trafficking. We agree with the concession made that the learned Judicial Commissioner erred in law in not sufficiently directing his mind as to the reason why in the face of the undisputed evidence the accused had failed to rebut the presumption of trafficking, in accordance with the principle laid down in *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169.

**[33]** The appellant in *Alcontara a/l Ambross Anthony v Public Prosecutor* was convicted for an offence of trafficking in 70,952.1g of cannabis, in contravention of s 39B(1)(a) of the DDA. And there was a failure on the part of the trial judge to rule whether the statutory presumptions of possession and trafficking had been rebutted and on this point Edgar Joseph Jr, FCJ had this to say at p 720 of the report:

This brings us to the next point in this appeal. Nowhere in his judgment did the Judge direct attention to the statutory presumptions as to possession (s 37(d) and trafficking (s 37(da)), and as a result, he made no finding as to whether the defence had rebutted the same. In our view, this was a misdirection in law by way of non-direction having regard to the following passage in the judgment of Azmi SCJ in *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169, at p 172 para 1:

In our opinion unless the evidence in a particular case does not obviously so warrant; it is incumbent for the court to consider whether on the balance of probabilities, the evidence of the defence has rebutted the statutory presumption of trafficking under s 37(da) as a separate exercise even though the court is satisfied on balance that the presumption of possession under s 37(d) has not been rebutted. In this case, the failure to do so was a material misdirection and was fatal to the conviction.

Having said that, we would add there may well be cases where because of the absolutely overwhelming nature of the affirmative evidence led by the prosecution, there is no need for resort to be had to the statutory presumptions aforesaid, but even in such a case, we consider that the trial Court should specifically so find.

**[34]** Flowing from these three authorities, learned counsel for the appellant urged this court to set aside the conviction for trafficking of the dangerous drugs, to wit, 9958.5g of cannabis and substitute it with a conviction for possession under s 6 of the DDA and punishable under s 39A(2)(f) of the DDA, in tandem with the judgment of the Federal Court in the case of *Tan Boon Kean v Public Prosecutor*.

**[35]** By way of a response, the learned deputy public prosecutor argued that the evidence of trafficking was overwhelmingly strong and the High Court judge had considered the defence in extenso from pp 110–121 of the appeal record at *Jilid* 2 and His Lordship found that the existence of Hafiz was highly

improbable and was in the nature of a mere denial. Snippets of the judgment of the High Court judge will now be reproduced (see pp 114–117 of the appeal record at *Jilid* 2):

> Versi pembelaan pula tidak boleh diterima dan tidak masuk akal. Pertama, OKT mengatakan beliau mengambil penumpang yang kemudiannya dikenali sebagai Hafiz pada jam 10.15 malam 19/5/2002 untuk dibawa ke Bukit Belah. Perjalanan ke tempat tersebut mengikut OKT mengambil masa lebih kurang satu jam. Ini bermakna OKT dan penumpangnya sampai di tempat tangkapan berlaku pada jam lebih kurang 11.15 malam hari yang sama iaitu 17/5/2002.
>
> Tetapi dari keterangan di Mahkamah, tangkapan dibuat oleh SP6 pada jam lebih kurang 2.30 pagi 17/5/2002. Bagaimana OKT boleh mengambil penumpang Hafiz ini pada jam 10.15 malam dan sampai di tempat kejadian pada jam lebih kurang 11.15 malam 17/5/2002. Ini tidak boleh berlaku, tidak benar dan tidak betul kerana beliau telah ditangkap di tempat kejadian pada jam lebih kurang 2.30 pagi 17/5/2002 bagaimana boleh beliau mengambil penumpang bernama Hafiz pada jam 10.15 malam hari tersebut.
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> Katakanlah Mahkamah memaafkan kesilapan dari segi tarikh ini dan menggantikanya dengan 16/5/2002. Ini juga tidak boleh benar dan tidak betul kerana dari keterangan pihak pendakwaan yang Mahkamah percayai dan tidak mempunyai sebab untuk tidak mempercayai, OKT telah ditahan dan ditangkap di tempat kejadian pada jam lebih kurang 2.30 pagi 17/5/2002 dan bukan pada jam lebih kurang 11.15 malam 16/5/2002 seperti yang dikatakan oleh OKT.
>
> Apa yang Mahkamah boleh rumuskan dari perbezaan masa yang diberi oleh OKT ialah bahawa OKT sengaja mengatakan bahawa beliau mengambil Hafiz pada jam 10.15 malam untuk menunjukkan ketiadaan keganjilan tentang beliau berbuat demikian sebagai seorang pemandu teksi sapu sedangkan kalau beliau berkata beliau telah mengambil penumpang pada jam 2.00 pagi atau sekitarnya, Mahkamah pasti akan tertanya-tanya mengapa beliau boleh mengambil penumpang pada jam tersebut. Ini akan nampak pelik dan luar kebiasaan kerana bukan mudah untuk mendapat langganan pada jam 2.00 pagi atau 2.30 pagi. Perlu juga diingat bahawa kereta OKT adalah kereta baru yang telah didaftarkan pada 25/3/2002 iaitu kurang dari dua bulan sebelum kejadian. Mahkamah berpendapat ini sangat pelik (*strange*) iaitu untuk satu kereta baru digunakan sebagai teksi sapu. Juga bagaimana Hafiz boleh mendapatkan perkhidmatan OKT. Adakah beliau tahu kereta OKT kereta sapu sedangkan mereka tidak pernah berkenalan sebelum ini dan juga kereta OKT adalah kereta baru serta tidak ada tanda pengenalan seperti teksi biasa. Bagaimana pula OKT boleh keluar mencari penumpang pada jam 2.00 pagi atau 2.30 pagi. Ini bukan masa untuk orang ramai berada di atas jalan raya mencari kenderaan awam untuk melakukan perjalanan. Tambahan pula kalau hendak dipercayai keterangan OKT, orang tersebut membawa satu beg yang penuh dengan dadah berbahaya dalam amaun yang begitu banyak. Tidak masuk akal langsung untuk perkara ini berlaku sedemikian. Sudah tentu orang tersebut telah membuat persediaan tentang pengangkutan samada dengan kenderaan sendiri atau disewa atau cara lain yang tidak bergantung pada nasib seperti dalam kes ini iaitu orang tersebut dengan sebuah beg berisi dadah berbahaya yang banyak mencuba nasib pada jam 2.00 ke 2.30 pagi mendapatkan perkhidmatan pengangkutan untuk pergi ke destinasinya.

Mahkamah telah mengambil kira segala keterangan pendakwaan tentang perkara ini dan menimbang keterangan OKT berkaitannya dan mendapati versi OKT tidak masuk akal, tidak boleh diterima dan satu penafian sahaja.

**[36]** In our judgment, since the evidence of trafficking against the appellant was solid as the rock of Gibraltar, so to speak, we agree with the learned deputy public prosecutor that we should invoke the proviso to s 60(1) of the Courts of Judicature Act 1964 (Act 91) and upheld the conviction and sentence, notwithstanding the misdirection by the High Court judge in not making a ruling whether the presumption of trafficking under s 37(da)(vi) of the DDA has been rebutted on the balance of probabilities. For convenience, we will now reproduce the proviso to s 60(1) of the Courts of Judicature Act 1964 (Act 91):

Powers of Court of Appeal

60 (1) At the hearing of an appeal the Court of Appeal shall hear the appellant or his advocate, if he appears, and, if it thinks fit, the respondent or his advocate, if he appears, and may hear the appellant or his advocate in reply, and the Court of Appeal may thereupon confirm, reverse or vary the decision of the High court, or may order a retrial or may remit the matter with the opinion of the Court of Appeal thereon to the trial court, or may make such other order in the matter as to it may seem just, and may by that order exercise any power which the trial court might have exercised:

Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

**[37]** It is acknowledged that not in every fact situation would the proviso to s 60(1) of the Courts of Judicature Act 1964 (Act 91) apply. Indeed it was not applied in *Teoh Hoe Chye v Public Prosecutor Yeap Teong Tean v Public Prosecutor* [1987] 1 MLJ 220 (SC). There, that outstanding judge Abdul Hamid bin Omar CJ (Malaya) (later the Lord President of the Supreme Court) at pp 229–230 succinctly said:

Supt Lum would clearly have been able to provide the missing link in the chain of evidence if he had been called to give evidence for the prosecution. For some unknown reasons he was not called. In our view, it was clear that in the particular circumstances of this case, the failure to call this witness had caused a serious break in the chain of evidence relating to the identity of the exhibits. The break was so serious that we do not think there is any statutory cure. We would add that any attempt in such a case to apply the provisions of s 60(1) of the Courts of Judicature Act 1964 would amount to a relaxation of the law of criminal procedure to such an extent as to deprive an accused person of his right. In this regard, it behoves us to reiterate that 'the requirement of strict proof in a criminal case cannot be relaxed to bridge any material gap in the prosecution evidence. Irrespective of whether the Court is otherwise convinced in its own mind of the guilt or innocence of an

A accused, its decision must be based on the evidence adduced and nothing else and therefore the appeal must be allowed and the conviction quashed' (*Sia Soon Suan v Public Prosecutor* [1966] 1 MLJ 116).

B **[38]** But the proviso to s 60(1) of the Courts of Judicature Act 1964 (Act 91) was applied to the factual matrix in the case of *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259 where the drugs in question were found in packets within the stomachs of the appellants. Each of the appellant had swallowed a packet containing the drug. Gopal Sri Ram JCA (later FCJ) writing for the Federal Court alluded briefly to the facts at p 264 in this way:

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> There is no dispute about the central facts relating to the possession of the drugs. It was established by the evidence and accepted by the learned judge that the drugs in question were found in packets within the stomachs of the appellants. Each appellant had swallowed a packet containing the drug. The learned trial judge found
D the appellants' version of how they had come to swallow the drugs in question as being implausible.

**[39]** And at p 265 of *Tunde Apatira*, His Lordship had this to say:

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> The course open to this court upon such a conclusion as aforesaid is not in doubt. Generally speaking, an appellant who is able to demonstrate a misdirection of law is entitled to have his conviction quashed. And an appellate court will, when there has been a miscarriage of justice, intervene and set aside a conviction where there has been withheld from an accused a rule of law operating in his favour: *Chiu Nang Hong v PP* [1965] 1 MLJ 40.
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> The expression 'miscarriage of justice' appears in the proviso to s 92(1) of the Courts of Judicature Act 1964. A similar expression, 'failure of justice' appears in s 422 of the Criminal Procedure Code. They mean the same thing. For, the same result follows when justice either fails or miscarries. The proviso reads as follows:

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> Provided that the Federal Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

> The way in which the proviso is to be applied has been considered in several cases.

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**[40]** Finally, at pp 266–267 of the case of *Tunde Apatira*, His Lordship generously applied the proviso to s 92(1) of the Courts of Judicature Act 1964 (Act 91) which is similarly worded, word by word with the proviso to s 60(1) of
I the same Act. This was what His Lordship said:

> So it comes to this. As a general rule this court will, in the normal course of events, quash a conviction where there has been a misdirection. Exceptionally, a conviction will be upheld despite a misdirection where this court is satisfied, that a reasonable tribunal would have convicted the accused on the available evidence on a proper

direction. The decision of this court in *Alcontara a/l Ambross Anthony v PP* [1996] 1 MLJ 209 exemplifies the general rule, while that in *Khoo Hi Chiang v PP* [1994] 1 MLJ 265 illustrates the exception.

Having scrutinised the record with care, we are satisfied that this is an appropriate case for the application of the proviso. The evidence, both direct and circumstantial, against the appellants is entirely overwhelming. A court applying s 37(da) of the Act in the manner required by *Muhammed bin Hassan* would have nevertheless convicted the appellants on the available evidence.

For these reasons, the appeals herein were dismissed. The convictions and sentences imposed on the appellants were affirmed.

**[41]** Again, the factual matrix of the case warranted the Federal Court in *Public Prosecutor v Abdul Manaf bin Muhamad Hassan* [2006] 3 MLJ 193; [2006] 2 CLJ 129 to apply the proviso to s 92(1) of the Courts of Judicature Act 1964 (Act 91). At pp 206–207 (MLJ); p 149 (CLJ) of the report, Arifin Zakaria FCJ (now Chief Justice) had this to say:

(21) In the present case, the drug was carried in small plastic packets each containing a small quantity of the drug. According to the evidence, 39.77g of heroin was found in a number of small plastic packets tucked in his waist, while 50 small plastic packets containing 9.09g of heroin was found in the right side pocket and another 30 small plastic packets containing 5.57g of heroin was found in the left side pocket of the track top he was wearing. 20 small plastic packets were found in each of the right and left pockets of his trousers, containing a total of 7.66g of heroin. Judging from the manner the drug was being carried ie, in small plastic packets and taking into account the total amount of the drug involved, the reasonable inference that may be drawn is that the respondent was in fact carrying it for the purpose of trafficking. And bearing in mind the large quantity of the drug involved, it cannot be seriously contended that the drug was for his own consumption. In any event, it was never suggested in his defence that it was so. His defence was a mere denial that the drug was ever found on him. This was rejected by the learned trial judge. We are satisfied he was not just a passive carrier. Armed with these facts, we are satisfied that had the learned trial judge properly directed himself, he would nonetheless have come to the same finding. In the circumstances, we hold that the Court of Appeal ought to have applied the proviso to section s 60(1) of the CJA and upheld the conviction and sentence notwithstanding the misdirection by the learned trial judge. For the above reasons, this appeal is allowed and the order of the Court of Appeal is set aside. Accordingly, the conviction and sentence imposed by the High Court are reinstated and affirmed.

**[42]** For these varied reasons, we vigorously applied the proviso to s 60(1) of

A the Courts of Judicature Act 1964 (Act 91) in favour of the prosecution and we, accordingly, dismissed the appellant's appeal. We affirmed the conviction and sentence forthwith.

*Appeal dismissed and conviction and sentence affirmed.*

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Reported by Ashok Kumar

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